

In re: BRONCO PRODUCE CORP., d/b/a J&J PRODUCE.
P.Q. Docket No. 00-0011.
Decision and Order filed August 16, 2000.

James Holt, for Complainant.

Respondent, Pro se.

Decision and Order issued Dorothea A. Baker, Administrative Law Judge.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [herein the Acts]¹, the regulations promulgated thereunder (7 C.F.R. §§ 301.11(b), 319.56-2ff), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on June 1, 2000.

The complaint alleged that on December 9, 1999, Bronco Produce Corp., d/b/a J&J Produce [herein the respondent], violated the Acts by moving 12 boxes of Mexican Hass avocados from the Bronx, New York, to Guaynabo, Puerto Rico. The complaint further alleges that on December 16, 1999, respondent violated the Acts by moving 26 boxes of Mexican Hass avocados from the Bronx, New York, to Guaynabo, Puerto Rico. Federal regulations provide that no person shall move any plant or plant part from a quarantined State into or through any State not quarantined with respect to that plant or plant part. 7 C.F.R. § 301.11. Federal regulations prohibit the distribution of Mexican Hass avocados outside of the following States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. 7 C.F.R. § 319.56-2ff(a)(3). The movement of each box of Mexican Hass avocados outside of the States quarantined for Mexican Hass avocados is a separate violation of the Acts. Pursuant to section 163 of the Plant Quarantine Act, the complainant is authorized to assess a civil penalty of \$1,000 for each violation of the Act. 7 U.S.C. § 163. Therefore the maximum civil penalty

¹I note that while section 438(a) of the Plant Protection Act, enacted on June 20, 2000, repealed the Act of August 20, 1912 (commonly known as the "Plant Quarantine Act:(7 U.S.C. 151-164a, 167) and the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*, 7 U.S.C. 147a note), section 438(c) of that Act states that "Regulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary issues a regulation under section 434 [Regulations and Orders] that supersedes the earlier regulation."

which could be assessed in these proceedings is \$38,000.²

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on June 1, 2000. After receiving an extension of time to file an answer in this matter,³ respondent filed an answer on July 7, 2000.

In its answer, respondent admitted that there was a “shipment of a few cases of Mexican avocados (sic) to Puerto Rico” and that it “involved 38 cases of the fruit and shipped only with the intention to service our customer in Puerto Rico.” A copy of an sworn statement made by Leoandro E. Fernandez to Michael F. Connors, an Investigator with the Investigative and Enforcement Services, USDA, was attached, and made part of the answer, by the respondent. In his sworn statement, Mr. Fernandez identified himself as “the President/Owner of Bronco Produce Corp. d/b/a J&J Produce located at 257-B NYC Terminal Market, Hunts Point, NY 10474.” Mr. Fernandez further states his records show that there were two sales to Puerto Rico: one sale on December 9, 1999, involving 12 boxes, and a second sale on December 14, 1999, involving 26 boxes.

The admission by the answer of all the material allegations of fact contained in the complaint constitutes a waiver of hearing. 7 C.F.R. § 1.139. On July 20, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, the material allegations alleged in the complaint, and admitted to in the answer, are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

²As already noted, section 438(a) of the Plant Protection Act, enacted on June 20, 2000, repealed the Act of August 20, 1912 (commonly known as the “Plant Quarantine Act”: (7 U.S.C. 151-164a, 167) and the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*, 7 U.S.C. 147a note). However, section 109 of Title One, United States Code (1 U.S.C. § 109) provides, in relevant part, that: “The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.”

³An Order Extending Time to File Answer, issued June 16, 2000, extended the time for respondent to file an answer to the complaint until July 10, 2000.

Finding of Fact

1. The mailing address of Bronco Produce Corp., d/b/a J&J Produce, is 257-B NYCTerminal Market, Hunts Point, Bronx, New York 10474.
2. On December 9, 1999, respondent moved 12 boxes of Mexican Hass avocados from the Bronx, New York, to Guanyabo, Puerto Rico.
3. On December 16, 1999, respondent moved 26 boxes of Mexican Hass avocados from the Bronx, New York, to Guanyabo, Puerto Rico.

Conclusion

It is a well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of plant pests is greatly increased. The imposition of sanctions in cases such as this are extremely important in the prevention of the spreading of plant pests. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address 38 violations of the Acts. A single violation of the Acts could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the \$3,800 civil penalty requested. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re S.S. Farms Linn County, Inc., et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons similarly situated to the respondent. *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976). "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the

penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id.* at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Acts and the regulations (7 C.F.R. §§ 301.11(b), 319.56-2ff).

Therefore, the following Order is issued.

Order

Bronco Produce Corp., d/b/a'. J&J Produce, is hereby assessed a civil penalty of three thousand, eight hundred dollars (\$3,800.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final September 26, 2000.-Editor]
